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Supreme Court of the United States

OCTOBER TERM 1947

No. 449

MARDEN & MURPHY, INC., *Petitioner*

v.

CITY OF LOWELL

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION

BURTON E. EAMES,
Attorney for Appellant.

PRESS OF GEO. H. ELLIS CO., BOSTON

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Supreme Court of the United States

OCTOBER TERM 1947

No. 449

MARDEN & MURPHY, INC., *Petitioner*

v.

CITY OF LOWELL

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:—

Your Petitioner, Marden & Murphy, Inc. respectfully shows to this Honorable Court as follows:

I.

STATEMENT OF FACTS

Proceedings below

This is a proceeding begun in the Land Court of Massachusetts on August 21, 1944 by the City of Lowell seeking to foreclose liens claimed by it under four tax takings, made by the Collector of Taxes of said City of Lowell August 17, 1942, purporting to take the lands of the petitioner therein described for non-payment of taxes assessed to petitioner for the years 1933 to 1941 inclusive. (R. 13)

The case was tried in said Land Court in November, 1945 and was decided by said Land Court on March 29, 1946. The assessments were held valid as to all four parcels involved. (Dec. R. 44) Foreclosure was denied as to Parcel 1 because the "taking" was held invalid solely under a rule

of Massachusetts law, but foreclosure was granted as to Parcels 2, 3 and 4. Both parties appealed to the Supreme Judicial Court of Massachusetts, which affirmed the decision of the Land Court by rescript handed down September 11, 1947 and transmitted to said Land Court on the same day. (R. 279-281)

As the case involved the validity of a statute of Massachusetts (St. 1938, c. 478) on the ground of its being repugnant to the Fourteenth Amendment, and the decision was in favor of its validity, your petitioner has taken an appeal to this Court which is docketed as number 449, October Term 1947. This petition for writ of certiorari is ancillary to said appeal.

Intentional and persistent Assessment for Water Power which Assessors knew Petitioner did not own

The four parcels involved are designated in the foreclosure petition as Parcels 1, 2, 3 and 4 (R. 1-3), and on the plan introduced as Ex. 10 (R. 57) it appears that Parcels 1 and 2 are situated northerly of Jackson Street and Parcels 3 and 4 southerly thereof. For convenience in identifying them we note that they are respectively designated on said plan as follows:

Parcel 1 as "Marden & Murphy, Inc., Mill No. 7 and Mill No. 7 Extension, 87,334 sq. ft."

Parcel 2 as "Marden & Murphy, Inc. 45,918 sq. ft."

Parcel 3 as "Marden & Murphy, Inc. 9,503 sq. ft." and

Parcel 4 as "Marden & Murphy, Inc. 2,997 sq. ft."

All these parcels, together with others later sold, were acquired by your petitioner in 1927 from the Receivers of Hamilton Manufacturing Company, together with a valuable water power designated in the deed as 16 mill powers "of the description, power and extent described in" an

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indenture between the Proprietors of the Locks and Canals on Merrimack River and said Hamilton Manufacturing Company dated December 1, 1853 and subject to all the provisions of said indenture and of an agreement dated August 1, 1848 between the Proprietors and the various manufacturing companies. (Dec. R. 13, 22; Ex. 12, R. 61; Ex. 16, R. 65; Ex. 15, R. 64) A "mill power" was defined in the indenture in terms of cubic feet of water per second at a stated head. (Ex. 16 Art. I, at p. 4)

For a clear understanding of this matter we should describe briefly the nature of this water power right.

All the water power available from the Merrimack River at Lowell was primarily owned by the Proprietors of the Locks and Canals on Merrimack River, a separate corporation dating back as far as 1792. The Proprietors owned and were obligated to maintain the dam across the river and the canal system, including the Hamilton (upper) Canal and the Pawtucket (lower) Canal, between which petitioner's properties, Parcels 1 and 2, are situated. Owning the land along the canals, they conveyed various mill sites and parceled out the water powers to manufacturing companies under deeds and leases, sometimes referred to as "indentures." (Dec. R. 22) These were uniform except as to the numbers of mill powers granted and the designation of the falls, as there were three levels in the canal system. (Evid. R. 82-83) The indenture from the Proprietors to Hamilton Manufacturing Company, dated December 1, 1853, and covering the sixteen mill powers, which came to petitioner from the Receivers as above, is found in Ex. 16, R. 65.

Petitioner's properties are *not contiguous to the river*, and it had no water power by virtue of riparian ownership or by virtue of ownership of *any* land. *Its only right to water power was under the indenture,* (Evid. R. 78-83; 90) and was contingent upon paying the annual rental ($300. per mill power), avoiding excessive use or waste and otherwise living up to its obligations as lessee. (Ex. 16, R. 65)

The picture thus presented is closely analogous to that which was before the Supreme Judicial Court of Massachusetts in *Crocker-McElwain Company* v. *Assessors of Holyoke*, 296 Mass. 338, which dealt with the Holyoke Water Power Company and the canals and water power maintained by that Company. Here, as in that case, the water power company maintains a dam across the river with "a system of canals running through the city in three levels." The mills or lessees take water from one canal, pass it through flumes or penstocks to their water wheels where the power is generated and thence through raceways or wasteways to another canal below. The leases convey stated numbers of mill powers which are defined in terms of cubic feet of water per second at a stated head. In both cases water power which was appurtenant originally to the land at either end of the dam has been appropriated by the water power company and distributed among various mills by *contract*.

The agreement of August 1, 1848 (Ex. 15; R. 64) to which the conveyance of the water powers was subject (supra p. 3), sometimes called the "Arbitration Agreement", was primarily for arbitration of disputes which might arise, but in paragraph XII it expressly contemplated that any of the lessees of water power might transfer their rights, provided the purchaser should enter into a direct agreement with the Proprietors assuming and adhering to the Arbitration Agreement.* When the petitioner acquired these mill powers from the receivers, it entered into the required agreement with the Proprietors, not only adhering to the Arbitration Agreement but also agreeing to perform all the lessee obligations under the lease. (Ex. 23; R. 68)

By deed March 27, 1933, recorded the next day, the petitioner conveyed all this water power to Hamilton Company, a separate corporation from Hamilton Manufactur-

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*The lease itself ran to the lessee and its "successors and assigns". (Ex. 16, Art. VIII, at p. 11)

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ing Company, "and thereafter owned no water power". (Dec. R. 13, 25; Evid. R. 90-91)

This deed conveyed with the water powers a large tract of land comprising substantially the whole of the original mill yard together with the old and new wheel houses; and all water wheels, generators, appurtenant equipment, etc. "situated on the premises hereby conveyed". (Ex. 26; R. 70; Plan Ex. 11; R. 71)

One water wheel was in fact situated in the basement of the building on Parcel 1, and by inadvertance was not mentioned. In order that there should be no question but that all the machinery and equipment had been conveyed, petitioner by deed dated February 8, 1937 and recorded the following day, conveyed this wheel and all turbines, generators, apparatus, and appurtenant equipment with the right to use, maintain, operate, etc. (Ex. 28; R. 74-75)

As required by the Agreement of 1848, Hamilton Company upon acquiring the water powers from the petitioner immediately entered into the necessary agreement with the Proprietors on March 28, 1933. (Ex. 27; R. 74)

Before the conveyance of March 27, 1933 to Hamilton Company, petitioner had conveyed to another corporation, Courier-Citizen Company, certain real estate lying between its water power plant and the Hamilton (or upper) Canal, but had excepted and reserved in and by said deed, full ownership of the penstocks and waterways leading from the Hamilton Canal, through the property conveyed, to petitioner's wheels and all rights and easements necessary to its ownership and use of the water powers, (Ex. 24; R. 68); and by the deed to Hamilton Company on March 27, 1933, all such ownership and rights thus excepted and reserved were passed on to Hamilton Company (Ex. 26; R. 70) together with full rights and easements for raceways or wasteways from the wheels thus conveyed to Hamilton Company, through petitioner's remaining property, to the Pawtucket (or lower) Canal.

An examination of the various deeds and conveyances with the accompanying plans, all which are in the record, will show therefore that at all times after March 27, 1933 (as to the wheel in Parcel 1 from February 8, 1937) Hamilton Company owned the entire water power plant and owned and had the right to use and maintain the penstocks bringing the water from the Hamilton Canal to its wheels; and had perpetual easements through the remaining property of the petitioner for its raceways or wasteways leading from its wheels to the Pawtucket (or lower) Canal.

Deed from petitioner to Courier-Citizen Company with exceptions and reservations of the rights (Ex. 24; R. 68)

Plan dated February and March 1927 (Ex. 25; R. 69)

Deed from petitioner to Hamilton Company March 27, 1933 (Ex. 26; R. 70) recorded the following day.

Plan of portion of Hamilton Yard of Marden & Murphy, Inc. February 14, 1933 (Ex. 11; R. 58, 71)

Deed to Hamilton Company February 8, 1937 (Ex. 28; R. 75)

See also General Plan (Ex. 10; R. 57)

The Board of Assessors of the City of Lowell knew of this conveyance (Dec. R. 24) and in 1933 and various subsequent years were repeatedly advised of this transfer of ownership both by petitioner and by Hamilton Company, by the tax returns of both companies. (Dec. R. 23-25)

Notwithstanding this definite knowledge, however, the Assessors persisted in assessing petitioner in each year from 1933 to 1941 inclusive a definite amount—twenty cents per square foot—on both Parcels 1 and 2 for this water power which they *knew* petitioner *did not own*. The amount of this overassessment in each year was $17,815.80 (89079 sq. ft. x 20 cts) on Parcel 1 and $9,925.80 (49629 sq. ft. x 20 cts) on Parcel 2.* Prior to the conveyance of the water power by petitioner, they had valued the entire area north

*The numbers of square feet assessed appear in the Land Court decision at R. pp. 17-19.

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of Jackson Street (including Parcels 1 and 2) by adding to the land value alone twenty cents a square foot for water power; and they had included water power as appurtenant to the whole area. They continued this method of assessing both Parcels 1 and 2 *after* the conveyance *as before*; and this persisted in all the years down through 1941. (Dec. R. 24; Evid. R. 107, 111-112, 116-119) The conveyance of the water power did not cause them to change their valuation of either Parcel 1 or 2. (Dec. R. 24; Evid. R. 106) In the assessment record for Parcel 1 in each year they expressly stated that water power was included (Dec. R. 17-19), and although not so stated in the assessment record, it appears clearly that water power was included in fact as to Parcel 2 (Dec. R. 24, 26; Evid. R. 106, 107-108; 111-112; 116-117; 119; 136-137). It is apparent that the Supreme Judicial Court of Massachusetts did not question this. (Opinion R. 282)

We submit it is an inescapable presumption that taxpayers generally were and are assessed *only* for property *owned* by them, respectively, and that your petitioner was a shining exception. Can there then be any question but that this treatment of petitioner was not only arbitrary but also harshly discriminatory?

Petitioner made all possible Efforts to Obtain Abatement of Illegal or Excessive Assessments for 1938 and 1939 but was wholly unable to obtain any hearing

As to the taxes for 1933, 1934 and 1935 petitioner did not attempt to appeal to the Appellate Tax Board. (Dec. R. 27)

As to taxes for 1936 and 1937 the petitioner did appeal, and the following reductions in assessed value were made by the Appellate Tax Board. (Dec. R. 26; Ex. 97, R. 249):

Parcel 1	reduced	from	$266,800.	to	$186,000.
Parcel 2	"	"	37,200.	"	15,000.
Parcel 3	"	"	22,300.	"	14,000.
Parcel 4	"	"	4,800.	"	3,000.
	Totals		$331,100.		$218,000.

In 1938 the statute objected to was passed by the Massachusetts Legislature (St. 1938, c. 478),* which became effective July 1, 1938, and therefore applied to any appeals for 1938 and subsequent years.

There were before this statute two roads by way of appeal from the refusal or failure of the Assessors to grant abatement. The aggrieved taxpayer could appeal to the County Commissioners (G.L. (Ter. Ed.) c. 59, s. 64 as amended by St. 1937, c. 400, s. 6) or he could appeal to the Appellate Tax Board (Section 65 of said chapter as amended by St. 1933, c. 167, s. 1). Both these roads were open without condition or qualification. The appeal in either case must be taken within *sixty days* after notice from the Assessors of their decision; but, if they failed to act on the taxpayer's application within four months from the date it was filed, it was deemed to be refused and the appeal in either case must then be filed within *ninety days* thereafter. (St. 1938, c. 478, s. 1)

This new statute inserted into those sections, as they previously existed, the requirement that, *before* appealing either to the County Commissioners or to the Appellate Tax Board, if the tax on a parcel exceeded $1,000., he must pay the *full amount* of the tax as assessed or approximately that amount under an alternative provision, (St. 1938, c. 478, s. 1, 2), but it also inserted a new section designated Sec. 65B, which provided in substance that appeal could be taken to the Appellate Tax Board, where the tax on the parcel assessed exceeded $1,000., if the taxpayer had paid *one-half* the amount required to be paid under the new sections 64 and 65 just discussed, *and* could satisfy said Board that he was unable to pay the balance.

The tax for each of the two years in question was more than $1,000. on each of the three parcels. (R. 27-29) The opinion of the Supreme Judicial Court states that there was no dispute but that these taxes were "greater than the

*This statute is set out in full as an appendix to the brief on this petition (infra p. 40)

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amount for which an abatement might be sought without payment upon the tax". (R. 283) The amounts of the taxes for 1939 upon all three parcels also appear in Ex. 54-56 (R. 127) and 86-88 (R. 212). Each was more than $1,000. The same was true as to 1938 taxes. (Evid. R. 188; 190-191; 214-215)

It is this statute, injected into the statutory provisions governing petitions for abatement, which under the established rule in Massachusetts are the taxpayer's *sole remedy* to obtain reduction of illegal or excessive assessments,* which barred petitioner from any hearing as to the validity or amount of its taxes for 1938 and 1939. This statute was upheld by the Land Court (Dec. R. 30) and by the Supreme Judicial Court (Opinion R. 283) as *not* repugnant to the Fourteenth Amendment, and it is this ruling which is the basis of the appeal in this case.

The Land Court found that petitioner seasonably applied to the Assessors for abatements for both years (Dec. R. 27; Ex. 53, 54-57; R. 126-127) that the Assessors did not act on the applications for either year but allowed the four months to run so that under the provisions of G. L. (Ter. Ed.) c. 59, s. 64, as amended, the applications were deemed to be refused, and the time for appeal began to run; and that they sent no notice to the petitioner as to either year. (R. 27-28)

It is a clear inference from the failure of the Assessors to act on the applications filed with them and their failure to send any notice to the petitioner regarding these applications for either year that petitioner was given *no opportunity for hearing before the Assessors.* It also appeared affirmatively, however, in the evidence. (Evid. R. 209, 222, 260-261), and the failure of the Assessors to act on the applications is recited in the petitions by which the petitioner

*That the statutory petition for abatement is the taxpayer's sole remedy is discussed in the petitioner's (appellant's) statement as to jurisdiction on the appeal in this case. (R. 303-304) It is also expressly stated in the opinion of the Supreme Judicial Court of Massachusetts. (R. 282-283)

attempted to appeal to the Appellate Tax Board. (Ex. 85-88; Evid. R. 209, 212).

Nor was there any way of compelling a hearing before the Assessors, even if such hearing would have been adequate. The statute gave the Assessors four months in which to act and provided that, at the expiration of that time, the application shall be deemed to be refused, and the time for appeal should begin to run. (St. 1938, c. 478, s. 1) Although the Massachusetts Court has stated that these provisions were not intended to relieve Assessors from the duty of hearing or deciding applications for abatement, but rather to provide adequate remedy if they did fail to perform that duty within a fixed time,

> *Eastern Racing Association* v. *Revere*, 300 Mass. 578, 581-582 (1938)

yet the statute contains no affirmative requirement that they shall either grant a hearing or make a decision. They are given four months within which they may act or refuse to act, and after that time has expired (unless an appeal is taken) they have no further authority to abate except that during the time *allowed* for appeal they may abate in final settlement by agreement with the taxpayer. (St. 1938, c. 478, s. 1; infra p. 40) The *Eastern Racing Association* case, just cited, dealt with the statutes as they existed in 1937 and held that a taxpayer who had not appealed to the Appellate Tax Board could not compel the Assessors to act on his application. The statutes at that time did not deprive the Assessors of the power to act after the time for appeal had expired* and the right to compel the Assessors to act, therefore, if it existed, would not have been lost. That case is therefore a definite authority to the effect that mandamus would not lie.

The Land Court also found that petitioner seasonably undertook to appeal to the Appellate Tax Board for both

*The provision depriving them of this power was first inserted by said St. 1938, c. 478, s. 1 (infra p. 40)

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years (Dec. R. 27-28); that as to 1938 the Board refused to accept the appeal on the ground that no part of the tax had been paid (Dec. R. 28; Ex. 85; Evid. R. 209-210); that as to 1939 the appeals were accepted by the Board but were later dismissed for lack of jurisdiction. (Dec. R. 29; Ex. 86-88; Evid. R. 212). The certified record, as appearing in these exhibits, shows that the motion to dismiss was grounded on the fact that the tax in each case was more than $1,000. and that no part of the tax had been paid.

The reason for petitioner's failure to make the required payments was its absolute inability to do so. The Land Court first ruled that the question of financial inability was immaterial (Dec. R. 29) but then proceeded to state that, if material, he could not find it as a fact (Dec. R. 30), basing this conclusion *solely* on an examination of statements of petitioner's financial condition which had been introduced in evidence. (Dec. R. 30) Since petitions to foreclose are equitable in their nature and since questions of constitutional right are involved, your petitioner, being permitted to refer to the evidence, *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659 (1945), *Creswill* v. *Grand Lodge*, 225 U. S. 246, 261 (1912) will contend, if the question of financial ability is material, that there was no basis for this conclusion by the Land Court but that the evidence was overwhelming to the contrary. This petition, however, is obviously not the proper place for such argument.

We have seen that the Courts of Massachusetts have sustained the assessments, notwithstanding that the Assessors intentionally and persistently included in their assessments in each year from 1933 to 1941, as to Parcels 1 and 2, a definite computed amount for water power which they *knew* petitioner did not own, a procedure which it is inconceivable that they could have followed with other taxpayers; that the Massachusetts courts have held that the statute, which barred petitioner from obtaining any hearing as to 1938 and 1939 taxes on Parcels 1, 2 or 3 is *not* repugnant to

the Fourteenth Amendment; and have held the assessments on said Parcels 1, 2 and 3 valid and enforceable notwithstanding that petitioner was afforded no opportunity for any hearing at any time before any tribunal or body, administrative or judicial, as to the validity or amount of those assessments.

We have seen that petitioner did not appeal to the Appellate Tax Board as to taxes for 1933, 1934 or 1935. We have also seen that the Appellate Tax Board gave substantial abatements for 1936 and 1937. (supra p. 7) It also appears that, for 1940 and 1941 taxes, petitioner was able to make the payments required by the statute and that the taxes for those years were settled by agreement while the appeals were pending. (Dec. R. 26; Evid. R. 249; 257-258)

It is fair to assume, therefore, that, at least as to 1936, 1937, 1940 and 1941, petitioner is not entitled to further relief. (Cf. Dec. R. 26) Petitioner's contentions and arguments will, therefore, be directed primarily to the 1938 and 1939 taxes on Parcels 1, 2 and 3, but petitioner will further wish to attack as wholly improper and unlawful the continued practice of the Assessors, in each year during the whole period, 1933 to 1941, of adding to or including in their assessments of Parcels 1 and 2 the value of the water power which they knew petitioner did not own; and to submit that this continuity is further cogent evidence that the assessments as to said parcels, for 1938 and 1939, were arbitrary, deliberate and persistent and were clearly discriminatory; and that said assessments were therefore in violation of the petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment.

II.

QUESTIONS PRESENTED

Briefly stated the questions presented are

(a) Whether the Massachusetts statute, St. 1938, c. 478, is repugnant to the Fourteenth Amendment. (Assignments of Error Nos. 1, 2, 3, 8)

(b) Whether the rule of law in Massachusetts whereby the taxpayer's sole recourse to contest the validity or amount of local tax assessments is by abatement proceedings and whereby in order to avail himself of these he must pay all or half the tax as assessed is a rule of law repugnant to the Fourteenth Amendment. (Assignments of Error Nos. 2, 4, 5, 6)

(c) Whether assessments finally adjudged binding on the petitioner by the decision of the State Court, where petitioner has been denied any hearing as to the validity or amount thereof, are in violation of petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment. (Assignments of Error Nos. 4, 5, 13)

(d) Whether assessments made on petitioner's properties for 1938 and 1939, wherein the assessing board has purposely and arbitrarily included in their valuation of petitioner's land for each year the valuation of an asset, namely a valuable water power, which they well knew belonged to another—whether by adding the value of such asset as a separate item or by increasing in a single assessment their valuation of property actually owned by the petitioner by a further amount representing solely the valuation of such asset—are in violation of petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment. (Assignments of Error Nos. 9, 11)

(e) Whether assessments made on petitioner's property for 1938 and 1939 in the manner set out in the preceding paragraph (d) and where in addition the assessing board in each year from 1933 to 1941 both inclusive systematically and persistently assessed the same property in the same manner, namely, by adding to or including in their assessment the value of said water power, which during said entire period they well knew petitioner did not own, are in violation of petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment. (Assignments of Error Nos. 10 and 12)

Petitioner respectfully refers to the Assignments of Error which are included in the accompanying brief as more fully setting forth the questions involved.

III.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The question whether said statute, St. 1938, c. 478, is repugnant to the Fourteenth Amendment has never been and should be determined by this Court.

2. The question whether the rule of law established under the statutes and decisions in Massachusetts, whereby abatement proceedings are the taxpayer's sole recourse to obtain reduction of assessments and whereby in order to avail himself of these he must pay all or half the tax as assessed, is a rule of law repugnant to the Fourteenth Amendment has never been and should be determined by this Court.

3. The Massachusetts Court has decided another federal question of substance in a way probably not in accord with applicable decisions of this Court, namely, that a local Board of Assessors may, without violation of the Fourteenth Amendment, in each year over a period of years,

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either add to or include in their assessment of petitioner's land a definite computed amount solely for water power which they know petitioner does not own.

4. The decision of the Massachusetts Court holding said statute (St. 1938, c. 478) not repugnant to the Fourteenth Amendment is in conflict with decisions of the highest courts of other states as to similar or analogous statutes of those states.

5. An authoritative decision by this Court as to the validity of the Statute and the right of the taxpayer to a hearing without payment of tax is of special importance to a deserving portion of the public.

WHEREFORE, for the reasons set forth herein and in the brief which accompanies this petition and in the record in this case on appeal, your petitioner respectfully prays that this petition for a writ of *certiorari* be granted.

Respectfully submitted,

Burton E. Eames

BURTON E. EAMES,
Attorney for Petitioner

December 4, 1947.

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BRIEF IN SUPPORT OF PETITION

I.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts is reported in Massachusetts Advance Sheets 1947, page 927. Copy of said opinion is filed in the record on appeal of this case in this Court. (R. 282)

The decision of the Land Court is found in the record herein on appeal. (R. 13-45)

II.

JURISDICTION

1. The jurisdiction of this Court is invoked under Judicial Code Section 237(b) as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 937, 28 U.S.C.A. Sec. 344(b).

2. The opinion of the Supreme Judicial Court of Massachusetts was rendered September 11, 1947 and rescript transmitted to the Land Court (the trial court) on the same day. (R. 279-281) Final decree of the Land Court pursuant to said rescript was entered October 23, 1947. (R. 290)

3. In the State Court there was drawn in question the validity of a statute of Massachusetts (St. 1938, c. 478) on the ground of its being repugnant to the Fourteenth Amendment to the Constitution of the United States, and the decision was in favor of its validity. (Opinion Supreme Judicial Court R. 283)

4. There were also set up and claimed by your petitioner, in addition, certain titles, rights, privileges and immunities under the Fourteenth Amendment to the Constitution of the United States as follows:

(a) The right, under the due process and equal protection clauses of the Fourteenth Amendment, to be afforded

a hearing as to the validity and amount of local tax assessments upon its property before such assessments are finally established against it.

(b) The right, under the due process and equal protection clauses of the Fourteenth Amendment, to be afforded a hearing on questions of law involved in its local tax assessments before a judicial tribunal.

(c) The right, under the due process and equal protection clauses of the Fourteenth Amendment, where petitioner claims, as here, that his constitutional rights are being violated, to a review of both law and facts by some tribunal other than the Board which levied the assessments.

(d) The right, under the due process and equal protection clauses of the Fourteenth Amendment, to be free from assessment upon property which the Assessing Board well know is owned not by petitioner but by another, whether by adding the value of such asset as a separate item or by increasing the value of property actually owned by petitioner by a further amount representing the value of such asset and nothing else.

(e) The right, under the due process and equal protection clauses of the Fourteenth Amendment, to have its property assessed for local tax assessments in accordance with rules of law and not to be subject to deliberate, arbitrary and persistent increases by Assessors by reason of an asset not owned.

(f) The right under the due process and equal protection clauses of the Fourteenth Amendment to have its property assessed for local tax assessments on the same basis of valuation as the similar property of other taxpayers in like situation.

Your petitioner respectfully refers to the Assignment of Errors set out below in subdivision number IV hereof for a more complete statement of the rights claimed by it herein.

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III.

STATEMENT OF THE CASE

It is believed that a sufficient statement of the case has been given under heading I. "Statement of Facts" in the petition, (supra pp. 1-12) and in the interest of brevity such statement is not repeated at this point.

IV.

SPECIFICATION OF ERRORS

We submit here the same Assignment of Errors as is set out in the appeal in this case. (R. 293-298)

1. The Court erred in ruling and deciding that Chapter 478 of the Acts of the Legislature of Massachusetts for 1938 is not invalid as being repugnant to the Fourteenth Amendment to the Constitution of the United States.

2. The Court erred in ruling and deciding that, in view of the settled rule in Massachusetts that proceedings for abatement are the exclusive remedy for overassessment, which rule was expressly applied and affirmed by the Court in this cause, Chapter 478 of the Acts of the Legislature of Massachusetts for 1938, governing the only proceedings available for abatement, is not repugnant to the Fourteenth Amendment to the Constitution of the United States.

3. The Court erred in ruling and deciding that payment of approximately one-half the tax as assessed "may constitutionally be made a condition of a hearing upon an application or an appeal for abatement regardless of the financial condition of the taxpayer."

4. The Court erred in refusing to find and rule that, where by reason of the settled rule in Massachusetts, affirmed and applied by the Court in this cause, that the exclu-

sive remedy of the Appellant for review of its assessments is by proceedings for abatement under the provisions of statute and of the statutory requirement for payment of approximately one-half the tax as a condition of appeal from the Board of Assessors to the Appellate Tax Board, the Appellant has been denied any hearing as to the validity and amount of its taxes for 1938 and 1939 on Parcels 1, 2 and 3, the decision, order and decree below, sustaining such assessments and the takings of Parcels 2 and 3 based thereon, involve a depriving of the Appellant of its property without due process of law and a denial to it of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

5. The Court erred in refusing to find and rule that the assessments upon the Appellant for 1938 and 1939 on Parcels 1, 2 and 3 and the takings of Parcels 2 and 3 based thereon involve a depriving of the Appellant of its property without due process of law and a denial to it of the equal protection of the laws within the prohibitions of the Fourteenth Amendment to the Constitution of the United States and are invalid, because Appellant was denied any hearing as to the validity and amount of such assessments.

6. The Court erred in refusing to find and rule that the rule of law established by the statutes and decisions of Massachusetts, whereby the only recourse of the Appellant to secure a reduction of assessments claimed to be excessive or invalid is by proceedings under the statutes for abatement and whereby in order to proceed under said statutes the taxpayer must first pay approximately one-half the amount of the tax, is a rule of law repugnant to the Fourteenth Amendment to the Constitution of the United States, and that the assessments for 1938 and 1939 as to Parcels 1, 2 and 3 are invalid.

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7. The Court erred in refusing to find and rule that, at the times when the payments required under Chapter 478 of the Acts of the Legislature of Massachusetts for 1938 must be made as a condition of taking appeal to the Appellate Tax Board with respect to the assessments for 1938 and 1939 on Parcels designated in the petition herein as Parcels 1, 2 and 3, the Appellant was wholly unable financially to make such payments.

8. The Court erred in refusing to find and rule that, where Appellant has been denied any hearing as to the validity and amount of the assessments for 1938 and 1939 on Parcels designated in the petition herein as Parcels 1, 2 and 3, such denial of hearing being due solely to the requirement of a statute of the Commonwealth of Massachusetts (St. 1938, c. 478) that approximately one-half the tax as assessed be paid as a condition of obtaining such hearing, with which requirement the Appellant was wholly unable financially to comply, said statute is in violation of the Appellant's rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and said assessments for said years upon said parcels are invalid.

9. The Court erred in refusing to find and rule that the assessments for the years 1933 to 1941, both inclusive, on Parcels 1 and 2, where in the assessments for each of said years and upon each of said parcels the Assessors purposely and arbitrarily included a large amount or value for water power which the Assessors during said entire period well knew the Appellant did not own, and the taking of Parcel 2 based thereon, are invalid, being in violation of Appellant's rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

10. The Court erred in refusing to find and rule that the decision, order and decree in this cause, sustaining the assessments for the years 1933 to 1941, both inclusive, as to Parcels 1 and 2 and the taking of Parcel 2 based thereon, where in the making of said assessments for each of said years and as to each of said parçels the Assessors knowingly, intentionally, arbitrarily, systematically, continuously and persistently included therein a definite fixed sum amounting to many thousands of dollars in each year, solely as representing the value of water power, which said Assessors at all times during said entire period well knew Appellant did not own, involve a depriving of the Appellant of its property without due process of law and a denial of the equal protection of the laws within the prohibitions of the Fourteenth Amendment to the Constitution of the United States.

11. The Court erred in refusing to find and rule that where, in the assessments for the years 1933 to 1941, both inclusive, on Parcels 1 and 2 the Assessors purposely and arbitrarily included for each of said years and upon each of said parcels a large amount or value for water power, which the Assessors at all times during said entire period well knew the Appellant did not own, while at the same time assessing all other taxpayers in said City only for property owned by them respectively, the said assessments for each of said years and as to each of said parcels and the taking of Parcel 2 based thereon are invalid, being in violation of the Appellant's rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

12. The Court erred in refusing to find and rule that the decision, order and decree in this cause, sustaining the assessments for the years 1933 to 1941 both inclusive as to Parcels 1 and 2 and the taking of Parcel 2 based thereon, where in the making of said assessments for each of said

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years and as to each of said parcels the Assessors knowingly, intentionally, arbitrarily, systematically, continuously and persistently included therein a definite fixed sum amounting to many thousands of dollars in each year solely as representing the value of water power, which said Assessors at all times during said entire period well knew Appellant did not own, while at the same time assessing all other taxpayers in said city only for property owned by them respectively, involve a depriving of the Appellant of its property without due process of law and a denial to it of the equal protection of the laws within the prohibitions of the Fourteenth Amendment to the Constitution of the United States.

13. The Court erred in refusing to find and rule that the assessments for 1938 and 1939 as to Parcels 1, 2 and 3 and the takings of Parcels 2 and 3 based thereon were and are invalid.

14. The Supreme Judicial Court erred in affirming the decision of the Land Court.

V.

ARGUMENT

Summary of Argument

1. The Question Whether said Statute (St. 1938, c. 478) is Repugnant to the Fourteenth Amendment Has Never Been and Should be Determined by This Court.

2. The Question whether the rule of law in Massachusetts whereby abatement proceedings are the taxpayer's sole recourse and whereby in order to avail himself of them he must pay all or half the tax as assessed, is a rule of law repugnant to the Fourteenth Amendment Has Never Been and Should be Determined by This Court.

3. The Massachusetts Court has decided another federal question of substance in a way probably not in accord with

applicable decisions of this Court, namely—that a local Board of Assessors, without violation of the Fourteenth Amendment, may in each year, over a period of years, either add to or include in their assessment of petitioner's land a definite computed amount solely for water power which they know petitioner does not own.

4. The Decision of the Massachusetts Court holding said Statute not Repugnant to the Fourteenth Amendment is in Conflict with Decisions of the Highest Courts of other States as to Similar or Analogous Statutes of those States.

5. An Authoritative Decision by this Court as to the Validity of the Statute and the Right of the Taxpayer to a Hearing without Payment of Tax is of Special Importance to a Deserving Portion of the Public.

1. *The Question Whether said Statute (St. 1938, c. 478) is Repugnant to the Fourteenth Amendment Has Never Been and Should be Determined by This Court.*

As to the years 1938 and 1939 as to Parcels 1, 2 and 3 the petitioner, although it followed the only procedure open to it under the law of Massachusetts to obtain a reduction of its assessments, was unsuccessful and has had no opportunity for hearing at any time, before any tribunal or body, either administrative or judicial, as to the validity or amount of its assessments for those years, *solely* because it was unable to comply with the requirement that it pay one-half the tax as assessed, which was the statutory condition of its obtaining a hearing before the Appellate Tax Board.

The question of the validity of the statute (St. 1938, c. 478), which required payment in order to obtain a hearing, is directly raised in the appeal in this case.

The Massachusetts court has held this statute *not* repugnant to the due process or the equal protection clauses of the Fourteenth Amendment. That decision, we respectfully submit, is not "in accord with applicable decisions of this Court.".

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The right of the taxpayer to a hearing before the tax levied upon him becomes finally established is fundamental under the decisions of this Court. If a hearing is not afforded him at *some* time, his rights under the Fourteenth Amendment are infringed, and the assessment is void.

Pittsburgh etc. Railway v. *Backus*, 154 U.S. 421 (1894)

Weyerhaeuser v. *Minnesota*, 176 U.S. 550 (1900)

Central of Georgia Railway v. *Wright*, 207 U.S. 127, 138 (1907)

Londoner v. *Denver*, 210 U.S. 373 (1908)

Turner v. *Wade*, 254 U.S. 64 (1920)

McGregor v. *Hogan*, 263 U.S., 234, 237 (1923)

American Surety Co. v. *Baldwin*, 287 U.S. 156, 168 (1932)

Nickey v. *Mississippi*, 292 U.S. 393, 396 (1934)

Morgan v. *U.S.*, 304 U.S. 1, 14-15 (1938)

Bowles v. *Willingham*, 321 U.S. 503 (1944)

While a hearing before an administrative board may be sufficient on questions of fact, the taxpayer is entitled to have questions of law passed on by a judicial tribunal.

Ohio Valley Water Company v. *Ben Avon Borough*, 253 U.S. 287 (1920)

Wadley Southern Railway v. *Georgia*, 235 U.S. 651 (1915)

And where, as in this case, the taxpayer claims his *constitutional* rights have been violated, he is entitled to a review of both law and facts by some tribunal other than the board which levied the assessment.

Chicago, Burlington and Quincy Railroad v. *Osborn*, 265 U.S. 14 (1924)

Londoner v. *Denver*, 210 U.S. 373 (1908)

The rule as laid down by this Court is *not qualified by any conditions.* It is absolute. The hearing may be delayed, as in

Phillips v. *Commissioner,* 283 U.S. 589, 596-597 (1931)

Bowles v. *Willingham,* 321 U. S. 503, 520 (1944)

but it must be afforded him at *some* time or his rights under the Fourteenth Amendment are violated.

It is important in approaching a consideration of this statute of which we complain (St. 1938, c. 478), and of the effect of the statute and the question of its validity, to recall

(1) that abatement proceedings are the *sole remedy* of the taxpayer in Massachusetts to obtain a revision of his local tax assessment. This is shown in Appellant's "Statement as to Jurisdiction on Appeal" in this case. (R. 303-304) It is also stated in the Opinion of the Supreme Judicial Court in this case. (R. 282-283)

(2) that abatement proceedings are governed wholly by the statute, G.L. (Ter. Ed.) c. 59, s. 59 et seq. The taxpayer must first apply to the Assessors for abatement under section 59. If their decision is not satisfactory or if, as in the present case, they fail to make any decision, his only remedy is by appeal either to the County Commissioners or to the Appellate Tax Board. In *Eastern Racing Association* v. *Revere,* 300 Mass. 578 (1938) the Massachusetts Court said (per Dolan, J. pp. 581-582)

> "In creating what is now the Appellate Tax Board it was the clear intention of the legislature to establish a *comprehensive system* whereby *all appeals* from the actions of taxing authorities of the commonwealth and its municipalities *should be heard and determined by that Board.*" (Italics ours)

(3) that prior to the enactment of the statute in question, the right of appeal, either to the County

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Commissioners or to the Appellate Tax Board, was free and unqualified. There was *no* condition precedent. (*supra* p. 8)

(4) that this new statute imposed drastic limitations which had never before existed. (The impact of this new statute upon sections 64 and 65, (governing appeals) as they previously existed, is also discussed in the Petition (*supra* pp. 8-9) and can be readily seen by a glance at the statute itself. The language which was inserted in those sections by St. 1938, c. 478 is indicated in *italics* in the copy of the statute annexed to this brief, and the new section 65B is set out in full. (*infra* pp. 39-41)

(5) that petitioner was given no opportunity for hearing before the Board of Assessors and that there was no way by which he could compel a hearing, even if a hearing before the Assessors would have been sufficient. (*supra* pp. 9-10)

It seems clear, therefore, that to obstruct petitioner's appeal to the Appellate Tax Board was in reality to obstruct and prevent the hearing to which, under the decisions of this Court for the past sixty years, it was entitled as a matter of constitutional right. The denial of the right to appeal was the denial of the right to a *hearing*.

In order to appeal from the decision of the Assessors, or from their failure to decide, in other words in order to obtain the hearing to which he is entitled, the taxpayer, under section 64 or 65, as thus amended, must pay the *entire* tax as assessed or approximately that amount under the alternative provision. Under the new section 65B he must pay *one-half* that amount and must satisfy the Appellate Tax Board that he is unable to pay the balance.

These requirements as to payment are *affirmative requirements*, expressly set out in the statute. Even under section 65B he must pay (approximately) one-half the tax. There is no elasticity about this provision. It is true that if he can show to the satisfaction of the Appellate Tax

Board that he is unable to pay the balance, he may be permitted to file his appeal; but the *first* one-half of the tax *must* be paid. The requirement is absolute. This payment is a condition precedent even to his *application* to the Appellate Tax Board for *leave* to file his appeal. The statute sets up a *property qualification*. There is no saving clause to protect him who *cannot* pay.

This, we submit, is fatal to the validity of the statute under the Fourteenth Amendment. If the inability of *this petitioner* is material, we shall attempt with confidence to show that fact; but entirely apart from this petitioner's financial condition there must be many cases where one owns land which may be *assessed* for more than $1,000. but has not the necessary $500. in his pocket.

Nor is there any room in this statute for an *interpretation* which would permit a taxpayer without money to obtain the hearing which in right and justice he ought to have, without making a payment which he is unable to make. If there is no room in the statute for such interpretation and if the denial of a hearing to the taxpayer, who could not fulfill the condition, results in depriving him of his constitutional rights, then the statute must fall.

In *United States* v. *Ju Toy*, 198 U.S. 253 (1905), the Court said, per Holmes, J. at pages 262-263,

> "The relevant portion (of the statute) being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exemption of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again. *United States* v. *Reese*, 92 U.S. 214, 221; *Trade-Mark Cases*, 100 U.S. 82, 98, 99; *Allen* v. *Louisiana*, 103 U.S. 80, 84; *United States* v. *Harris*, 106 U.S. 629, 641, 642; *Virginia Coupon Cases*, 114 U.S. 269, 305; *Baldwin* v. *Franks*, 120 U.S. 678, 685-689; *Smiley* v. *Kansas*, 196 U.S. 447, 455."

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The exemption of the taxpayer who is financially embarrassed cannot be read into the statute "merely for the purpose of saving what remains", and the statute must fall as a whole.

2. The Question Whether the Rule of Law in Massachusetts, whereby Abatement Proceedings Are the Taxpayer's Sole Recourse and Whereby in Order to Avail Himself of Them he must Pay all or half the tax as assessed, is a Rule of Law Repugnant to the Fourteenth Amendment has never been and should be determined by this Court.

It may be said that the inability of the petitioner in this case to obtain any hearing as to the validity or amount of its assessments for 1938 or 1939 upon Parcels 1, 2 or 3 is due to two things: *first*, the settled rule in Massachusetts that abatement proceedings are the exclusive remedy of the taxpayer to correct invalid or excessive assessments, and *second*, the provisions of the statute complained of which injected into the statutes governing such proceedings the condition that approximately all or one-half the tax as assessed must be paid in order to have access to the Appellate Tax Board; and it may be said that if either of these rules were changed, the difficulty might be removed.

In other words it may be said that the violation of petitioner's rights under the Fourteenth Amendment is due to the combination of these two principles.

It is apparent, however, that in this case the opinion of the Supreme Judicial Court of Massachusetts expressly holds adversely to your petitioner upon *both* points; for it holds (1) that "the only remedy of the respondent was by a petition for abatement" (Opinion, R. 282-283) and (2) that the statute is not repugnant to the Fourteenth Amendment. In the language of the Massachusetts Supreme Court

> "It is settled that such a payment may constitutionally be made a condition of a hearing upon an application or an appeal for abatement regardless of the financial

> condition of the taxpayer. *Old Colony Railroad* v. *Assessors of Boston*, 309 Mass. 439; *Lincoln Hotel Co.* v. *Assessors of Boston*, 317 Mass. 505. We remain satisfied with those decisions which are decisive as to the present objections raised by the respondent." (Opinion R. 283)

As we have shown in our "Statement as to Jurisdiction on Appeal" (R. p. 302) the cases cited by the Massachusetts Court involved the same statute here in issue, and both cases dealt specifically with the taxpayer's objections under the due process and equal protection clauses of the Fourteenth Amendment and held that statute valid.

Thus it was on the definite assumption or basis that abatement proceedings were the sole remedy which was available to the taxpayer that the statute was held to be valid.

We respectfully submit that if this situation presents a federal question which does not involve strictly and solely the question whether the statute itself is repugnant to the Fourteenth Amendment, that question is whether the *rule of law* established by the statutes and decisions of Massachusetts, whereby (1) the only recourse of petitioner to secure a reduction of taxes claimed to be excessive or invalid is by proceedings under the statutes for abatement and whereby (2) in order to proceed under said statutes the taxpayer must first pay all or one-half the amount of the tax as assessed, is a rule of law repugnant to the Fourteenth Amendment to the Constitution of the United States; and that this question in its entirety has not been and should be determined by this Court.

On this question we respectfully refer the Court to the authorities and arguments in the preceding division of this brief.

3. The Massachusetts Court Has Decided Another Federal Question of Substance in a Way Probably Not in Accord with Applicable Decisions of this Court, namely, that a local Board of Assessors, without violation of the

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Fourteenth Amendment, may in each year, over a period of years, either add to or include in their assessment of petitioner's land a definite computed amount solely for water power which they know petitioner does not own.

The State Court has upheld the assessments on Parcels 1 and 2 as valid notwithstanding that it clearly appeared that the Assessors for each year from 1933 to 1941, both inclusive, had included in their valuation of each of said parcels an item of twenty cents a square foot for water power which during said entire period they well knew petitioner did not own. This was an excess assessment in each year of nearly $18,000. on Parcel 1 and nearly $10,000. on Parcel 2. (supra p. 6)

Both the Land Court (R. 26) and the Supreme Judicial Court Opinion (R. 282-283) appeared to regard these over-assessments as entirely legal, on the ground that the water power "was not assessed as a separate piece of property" but had been treated merely as "enhancing" the value of the land and concluded that petitioner's only remedy therefore was by petition for abatement. It should be noted, however, that this is not a mere case of mistaken judgment of values. Here the Assessors did not in any true sense make an assessment or valuation of petitioner's land. What they called their "assessed value" in this case is made up of (a) their estimate of the value of petitioner's land plus (b) a further amount representing what they deemed to be the value of another asset which they were fully aware belonged wholly to someone else.

In *United States* v. *County of Allegheny, Pennsylvania,* 322 U.S. 174 (decided May 1, 1944) it appeared that it had long been the practice in Pennsylvania, in imposing a tax upon land, to treat machinery installed on the land as merely "enhancing" the value of the land and to reach the machinery for taxation in this manner. Under this practice the county authorities assessed land of the Mesta Company and included in its assessment the value of certain machinery on

the property, which in fact belonged to the United States. This Court said (p. 185)

> "We discern little theoretical difference, and no practical difference at all, between what was done, and what would be done if the machinery were taxed in form. Its full value was ascertained and added to the base to which the annual rates would apply—We hold that the substance of this procedure is to lay an *ad valorem* general property tax on property owned by the United States."

Of course the right which was impaired in the Mesta case was the right of the government to be exempt from local taxes upon its property. In the case at bar the right which is impaired is the right of the petitioner to be exempt from assessment upon property it did not own. In the Mesta case the property included in the assessment was in fact situated on the land. In the case at bar the water power had been wholly detached from the petitioner's land and was no longer appurtenant to it. Legally and in fact it was no longer there. It had been made appurtenant to the land of another.

The same element of illegality is present in these assessments as was present in *Great Northern Railway v. Weeks*, 297 U.S. 135 (1936) where this Court held that the failure of the assessing Board to consider

> "the enormous diminution in value of the petitioner's property caused by the 1929 collapse and the progress of the depression,"

which the Court held were matters of judicial notice,

> "is, within the principles of our decisions, the equivalent in law of intention to make a grossly excessive assessment for 1933 in disregard of petitioner's rights under the due process clause of the Fourteenth Amendment."

An overassessment purposely made by including in their valuation an asset which they knew was owned by another

would appear to be quite as "purposeful" as one made in disregard of a well known enormous diminution of values. Indeed the two cases have striking elements of similarity. In the *Great Northern Railway* case the "single valuation" of the land had not been diminished as it should have been. In the case at bar the "single valuation" of the land had been deliberately and arbitrarily increased by adding (or including) a value for water power which no one could seriously claim should have been either added to or included in it. Indeed the case at bar is much stronger than the *Great Northern* case in that in the present case we find deliberate and long continued overloading of the assessments.

In the *Great Northern Railway* case, Mr. Justice Stone with whom Mr. Justice Brandeis and Mr. Justice Cardozo agreed, dissented on the ground that the petitioner had not shown that the tax was discriminatory. But the element of discrimination is present in the case at bar.

Although, as to Parcels 1 and 2, the Assessors undertook to assess petitioner for a valuable asset which they knew it did not own, it remains, as we submit, a clear presumption that they did *not* undertake to practice this method with other taxpayers. It cannot be conceived that it is the practice of the Assessors of Lowell or of any other Assessors to assess to A a water power or any other asset which they *know* belongs to B. The maxim *res ipsa loquitur* would seem to be pertinent, in an application perhaps novel but eminently sound.

The *Great Northern Railway* case, therefore, is still a valid precedent for the illegality of these assessments. The discrimination, the absence of which led to the dissent, is *not* lacking here.

There are a number of other cases in which this Court has held that, where the property of one owner is intentionally and arbitrarily assessed on a higher basis of valuation

than is similar property of others, there is denial of equal protection.

Sioux City Bridge Company v. *Dakota County*, 260 U.S. 441 (1923)

Cumberland Coal Company v. *Board of Revision*, 284 U.S. 23 (1931)

In *Hillsborough* v. *Cromwell*, 326 U.S. 620 (1946) this Court said, per Douglas, J. p. 623

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed upon others of the same class. The right is the right to equal treatment."

Where such treatment is systematic and long continued it would seem the proof of discrimination is apparently more easily established, but if it appears to be purposeful or deliberate, that is enough.

Mackay Telegraph etc. Company v. *Little Rock*, 250 U.S. 94 (1919)

Snowden v. *Hughes*, 321 U.S. 1 (1944)

In the latter case the Court said, Stone C. J. (pp. 9-10)

> "Such discrimination may also be shown to be *purposeful* and hence denial of equal protection *even though it is neither systematic nor long continued*. Cf. *MacFarland* v. *American Sugar Co.*, 241 U.S. 79." (Italics ours)

In the present case this deliberate overassessment covered the entire period from 1933 to 1941; and five of those years were before 1938.

4. The Decision of the Massachusetts Court holding said Statute not Repugnant to the Fourteenth Amendment is in Conflict with Decisions of the Highest Courts of other States as to Similar or Analogous Statutes of those States.

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A statute of Maine which required a deposit of taxes, interest and costs before the owner of the land could commence or defend a suit to contest the validity of the assessment and sale of his land for taxes was before the Supreme Court of Maine in *Bennett* v. *Davis*, 90 Maine 102 (1897). The statute was held unconstitutional, being in violation not only of the Constitution of Maine but also of the due process clause under the Fourteenth Amendment to the Constitution of the United States. The Court said, p. 105:

> "While the legislature may regulate the use of legal remedies, may require the payment of various fees, and may require security to be given for fees and costs, the requirement of this statute is not within either category. This requirement practically is that before he 'begins' his action, or his defense, he shall pay into court the whole sum claimed against him including interest and costs. With such an obstacle placed in his way by the legislature, the citizen can not be truly said to have remedy by due course of law, or to have right and justice administered to him freely and without sale. As well might the legislature undertake to enact that no defendant shall begin his defense until he pays into court the whole sum demanded of him. It is not what has been done, or ordinarily would be done under a statute, but what might be done under it that determines whether it infringes upon the constitutional right of the citizen. The constitution guards against the chances of infringement. It is evident that under this statute the citizen might in some cases be practically deprived of all remedy."

This Maine statute did not even require payment of the tax but merely the *deposit* of the necessary funds in court.

The statement as to the conflict between this statute and both the state constitution and the Fourteenth Amendment was repeated as recently as 1941 in *Warren* v. *Norwood*, 138 Maine 180, 196 (1941) and see also *Vigue* v. *Chapman*, 138 Maine 206, 211 (1941).

A statute of Illinois provided that a party could not question a tax title set up against him without first showing

he had paid all taxes due and assessed on the lot. In *Wilson* v. *McKenna*, 52 Ill. 43 (1869) the Court (Breese, C. J.) said (pp. 48-49) that this statute had

> "long remained a dead letter upon the statute book and is not considered of any validity, the effect of it being to compel a man to buy justice. This no one can be compelled to do under our organic law * * * Should justice be denied to him who has not wherewithal to pay for it? The conditions imposed by this act deprive a poor man of justice and has no sanction in the constitution."

In *Reed* v. *Tyler*, 56 Ill. 288, 292 (1870) the case of *Wilson* v. *McKenna* was cited with apparent approval, and as recently as 1922 in *City of Chicago* v. *Collin*, 302 Ill. 270, 273 both *Wilson* v. *McKenna* and *Reed* v. *Tyler* were cited with apparent approval.

A somewhat similar but slightly more drastic statute was involved in *Weller* v. *St. Paul*, 5 Minn. 95 (1860) and was held unconstitutional as requiring the aggrieved party to purchase the right to his status in Court. The Court said (Atwater, J., p. 101)

> "I can conceive of no other object of this provision than to make it more onerous and difficult for persons to contest the validity of city assessments, a difficulty which, perhaps in many cases, might amount to an entire denial of justice. This object is unconscionable and unjust, and inconsistent with the provisions of the Constitution."

5. An Authoritative Decision by this Court as to the Validity of the Statute and the Right of the Taxpayer to a Hearing without Payment of tax is of Special Importance to a Deserving Portion of the Public.

The situation facing the taxpayer is calculated to delay, discourage and make difficult if not impossible any test of the validity of the statute by any owner of land who is without funds, and an authoritative decision is, therefore, of special importance to any who are or may be so situated.

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The way of the taxpayer who is without the necessary funds to comply with the statute is indeed hard. In the first place if his tax is over $1,000. and he cannot pay the $500. required by the statute, how could he possibly finance a contest of its validity? This petitioner was fortunate in being able to make a lease late in 1939 which, although it did not enable it to make the payment required by the statute on the 1939 tax (one-half of nearly $14,000.—Ex. 86-88; Evid. R. 212) did yield rentals thereafter which have enabled it to avoid a final surrender of its rights. (Evid. R. 218-219) But such an outcome cannot ordinarily be expected. This petitioner has indeed been fortunate in that respect.

The unfortunate taxpayer who is without funds obviously cannot appeal if the statute is to control. A hearing before the Assessors, if he is fortunate enough to obtain it, could settle only questions of fact, and if he claimed the assessment was *illegal*, he would find himself denied the hearing to which he is entitled, that is before the Appellate Tax Board.

No course would be open to him, therefore, but to wait. If he lacks the money, obviously he could not pay the tax and sue to get it back. If the Collector should elect to bring suit against him for the tax, which he may do after three months from the time it is committed to him (G.L. (Ter. Ed.) c. 60, s. 35), he could set up all his contentions in defense to the suit, *if* he had the money with which to defend. Suit, however, is seldom resorted to for collection of tax on real estate, as sale (or taking) is considered a more effective means.

Nichols on Taxation in Massachusetts (3rd Ed.) p. 382

And a sale or taking is ordinarily not used as a practical matter until about a year after a demand has been made.

Nichols on Taxation in Massachusetts (3rd Ed.) p. 385

If, after the usual delay, the Collector should see fit to sell or "take" his property under G.L. (Ter. Ed.) c. 60, s. 37, 40, 53-55 a period of *two years* must elapse before the purchaser or the City could seek foreclosure (G.L. (Ter. Ed.) c. 60, s. 65). This would be the next opportunity afforded him to set up his contentions as to illegality. The question of the *amount* of assessment would not be open either on suit by the Collector or in foreclosure proceedings. *Garden Cemetery Corp.* v. *Baker*, 218 Mass. 339. *Nichols on Taxation in Massachusetts* (3rd Ed.) pp. 387, 395. The taxpayer who is poor must, therefore, be subject to uncertainty and anxiety for an uncertain period of time which may run into years, and unless his fortunes have taken a radically favorable turn, he *could not afford the expense* of defending either against a *suit* by the Collector for the tax or against a *foreclosure petition* following the taking.

We have not considered in the above discussion the question of resorting to the federal courts by equity proceedings. That, too, would entail substantial expense, and the remedy for illegal taxation ought to be found in the courts of the state without invoking the federal jurisdiction.

If we may assume for purposes of argument that the statute *is* actually repugnant to the Fourteenth Amendment, then the taxpayer who is "land poor", who owns land but is unable to pay one-half the amount of the tax assessed, will be in danger of losing that which he has, and the injujstice, if there be injustice, will thus be perpetuated unless and until the questions herein presented are authoritatively adjudicated by this Court.

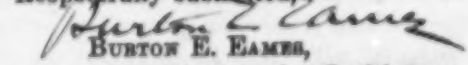
As to any taxpayer who is able financially to comply with the statute, he will in all probability do so for his own self-protection. If he can comply, why should he run risks? Full compliance with the statute would be his conservative course; but so far as the state law is concerned, the taxpayer without money is faced with difficulties which it is very doubtful if he can overcome. Claiming constitutional rights, he is unable to assert them, and constitutional rights should *not* be allowed to lapse or fail by *default*.

VI.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



BURTON E. EAMES,
Attorney for Petitioner

APPENDIX A.

St. 1938, c. 478

(This statute amended General Laws, Chapter fifty-nine, sections sixty-four and sixty-five, by inserting additional provisions. It also added a new section designated sixty-five B. In the following the *language inserted by this statute in sections sixty-four and sixty-five is italicized.* If we omit the italicized words, we have sections sixty-four and sixty-five substantially as they previously existed.*)

AN ACT RELATIVE TO ABATEMENT OF CERTAIN TAXES.

Whereas, The deferred operation of this act would tend to defeat its purpose, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted, etc., as follows:

Section 1. Chapter fifty-nine of the General Laws is hereby amended by striking out section sixty-four, as most recently amended by section six of chapter four hundred of the acts of nineteen hundred and thirty-seven, and inserting in place thereof the following:—*Section 64.* A person aggrieved by the refusal of assessors to abate a tax *on personal property which has been paid, or a tax of not more than one thousand dollars on a parcel of real estate, or a tax of more than one thousand dollars on a parcel of real estate which tax either has been paid or on account of which there has been paid a sum not less than the amount which would be assessable in said year upon a valuation equal to the average of the valuations of said parcel, as reduced by reason of abatements, if any, for the three years*

*The only exceptions were the following:—in line 16 of Section 1 the words "section sixty-three" were substituted for "the preceding section" and in line 8 of Section 2 the words "Appellate Tax Board" were substituted for "Board of Tax Appeals."

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next preceding said year, may, within sixty days after receiving the notice provided in section sixty-three, or within ninety days after the time when the application for abatement is deemed to be refused as hereinafter provided, appeal therefrom by filing a complaint with the clerk of the county commissioners, or of the board authorized to hear and determine such complaints, for the county where the property taxed lies, and if on hearing the board finds that the property has been overrated, *and that the complainant has complied with all applicable provisions of law,* it shall make a reasonable abatement and an order as to costs. Whenever a board of assessors, before which an application in writing for the abatement of a tax is or shall be pending, fails to act upon said application, except with the written consent of the applicant, prior to the expiration of four months from the date of filing of such application it shall then be deemed to be refused *and the assessors shall have no further authority to act thereon; provided, that during the period allowed for the taking of an appeal the assessors may by agreement with the applicant abate the tax in whole or in part in final settlement of said application, and shall also have the authority granted to them by section seven of chapter fifty-eight A to abate, in whole or in part, any tax as to which an appeal has been seasonably taken.* If the list of personal property required to be brought in to the assessors was not brought in within the time specified in the notice required by section twenty-nine, no tax upon personal property shall be abated unless the board appealed to finds good cause for this delay or unless the assessors have so found as provided in section sixty-one, or unless such tax exceeds by fifty per cent the amount which would have been assessed on such estate, if the list had been seasonably brought in, and in such case only the excess over such fifty per cent shall be abated. A tax or assessment upon real estate may be abated although no list of property was brought in within the time specified by the notice re-

quired by section twenty-nine; provided, that the application for an abatement of such tax or assessment included a sufficient description of the particular real estate as to which an abatement is requested.

Upon the filing of a complaint under this section the clerk of the county commissioners or of the board authorized to hear and determine the same shall forthwith transmit a certified copy of such complaint to the assessors and the assessors or the city solicitor or town counsel may within thirty days after receipt of said copy give written notice to said clerk and to the complainant that the town elects to have the same heard and determined by the appellate tax board. Thereupon, the clerk of the county commissioners or of the board authorized to hear and determine such complaints shall forward all papers with respect to such complaint then in the file of the county commissioners or other such board to the clerk of the appellate tax board and proceedings with respect to such complaint shall thenceforth be continued as provided in chapter fifty-eight A. If upon hearing *it appears that the complainant has complied with all applicable provisions of law and* the appellate tax board finds that the complainant is duly entitled to an abatement, it may grant him such reasonable abatement as justice may require, and shall enter an order directing the treasurer of the town to refund said amount, if the tax sought to be abated has been paid, together with all charges and interest at five per cent on the amount of the abatement from the date of the payment of the tax. The board may make such order with respect to the payment of costs as justice may require.

Section 2. Said chapter fifty-nine is hereby further amended by striking out section sixty-five, as most recently amended by section one of chapter one hundred and sixty-seven of the acts of nineteen hundred and thirty-three, and inserting in place thereof the following:—*Section 65.* A person aggrieved as aforesaid may, instead of pursuing

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the remedy provided in section sixty-four, but subject to the same conditions, appeal to the appellate tax board by filing a petition with such board within sixty days after receiving the notice required by section sixty-three, *or within ninety days after the time when the application for abatement is deemed to be refused as provided in section sixty-four.* Such appeal shall be heard and determined by said board in the manner provided by chapter fifty-eight A. The board may enter such order as justice may require in the manner provided in the preceding section with respect to complaints removed from the county commissioners.

Section 3. Said chapter fifty-nine is hereby further amended by inserting after section sixty-five A the following new section:—*Section 65B.* A person aggrieved by the refusal of assessors to abate a tax of more than one thousand dollars on a parcel of real estate, on account of which tax there has been paid either a sum not less than one-half of the amount of such tax or a sum not less than one-half of the amount which would be assessable in said year upon a valuation equal to the average of the valuations of said parcel, as reduced by reason of abatements, if any, for the three years next preceding said year, who claims to be unable presently to pay the amount of tax remaining unpaid, may, within sixty days after receipt of the notice provided in section sixty-three, or within ninety days after the time when the application for abatement is deemed to be refused as provided in section sixty-four, petition the appellate tax board for leave to file an appeal therefrom to said board. Such petition shall allege that the petitioner is unable presently to pay such amount of tax, and that, except for failure to comply with the provision of section sixty-four relative to payment of such tax, the petitioner is entitled to an appeal under section sixty-five, and shall be filed with the clerk of the appellate tax board. A notice of the filing of such petition shall be given by said clerk to the appropriate assessors within five days from the date of

the filing of such petition, in such form and in such manner as the appellate tax board shall by rule provide, and a hearing, due notice of which shall have been given, shall be had on such petition not later than twenty days from the date of the filing thereof. Such petition shall be heard by a single member of said board. If such member finds the allegations in such petition to be true, he may, by order, grant leave to such petitioner to file such appeal, within ten days from the entry of said order, upon such conditions as may be imposed therein, which may require such petitioner to pay, in whole or by installments, the amount of the tax remaining unpaid, as a prerequisite to any hearing on the merits of the appeal filed under said order. If the complainant fails to comply with any of the conditions imposed in said order an appeal filed thereunder may, upon motion, be dismissed by any member of said board. If the complainant complies with the conditions imposed in said order the appeal filed thereunder shall thereafter be heard and determined by said board in the manner provided by chapter fifty-eight A. The board may enter such order as justice may require in the manner provided in section sixty-four with respect to complaints removed from the county commissioners.

(Section 4 is omitted.)

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